

BEFORE THE NEBRASKA TAX EQUALIZATION  
AND REVIEW COMMISSION

J. C. PENNEY CO., INC.,

Appellant,

V.

LANCASTER COUNTY BOARD  
OF EQUALIZATION,

Appellee.

Case No. 96R-90

## FINDINGS AND ORDERS

Filed June 26, 1997

Appearances:

For the Appellant:

George A. Rawlings  
Senior Appraiser  
J. C. Penny  
P.O. Box 10001  
Dallas, TX 75301-1217

For the Appellee:

Michael E. Thew, #15771  
Deputy County Attorney, Lancaster County  
555 South 10<sup>th</sup> Street  
Lincoln, NE 68508

Before: Commissioners Edwards and Reynolds

Reynolds, Chairman for the Commission:

## SUMMARY OF DECISION

The Commission affirms the decision of the Lancaster County Board of Equalization, and denies Taxpayer's request for a further reduction in the assessed value of the subject property.

## NATURE OF THE CASE

J. C. Penny Co., Inc., ("Taxpayer") owns certain commercial real property located in the City of Lincoln, Lancaster County, Nebraska. Taxpayer filed a protest with the Lancaster County Board of Equalization ("County") alleging that:

"Current assessment is not true market value." *Taxpayers Form 422*.

By way of relief, Taxpayer requested that the total valuation of the land and improvements be reduced from a total of \$8,685,000 to \$5,285,910.

## APPLICABLE STATUTORY PROVISIONS

The county assessor has the duty to supervise and direct the assessment of all of the property in the county. Neb. Rev. Stat. §77-1311 (Reissue 1996).

Nebraska state statutes require that "all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value." Neb. Rev. Stat. §77-201 (Reissue 1996).

The actual value of the real property "shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal techniques, including, but not limited to: (a) Comparison with sales of real property of known or recognized value, taking into account location, zoning, and current functional use; (b) Earning capacity of the real property; and (c) Reproduction cost less depreciation." Neb. Rev. Stat. §77-112 (Reissue 1996).

The actual value is to be determined as of January 1, at 12:01 a.m.. Neb. Rev. Stat. §77-1301 (Reissue 1996).

A taxpayer who is dissatisfied with the county assessor's determination of assessed value of real property must file a written protest with County. Neb. Rev. Stat. §77-1502 (Reissue 1996).

A taxpayer who is dissatisfied with any action of the county board of equalization may appeal to the Tax Equalization and Review Commission within thirty days after adjournment of the board. Neb. Rev. Stat. §77-1510 (Reissue 1996).

The Commission may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence. Neb. Rev. Stat. §77-5016 (5) (Reissue 1996).

## ANALYSIS

### I.

#### Overview

Taxpayer's appeal from County includes the Appeal Form required by Title 442 *Nebraska Administrative Code*, Chapter 5, Rule 001. Taxpayer alleges that the current assessment is not the fair market value.

In order to prevail on its allegation, the Taxpayer must show that the decision of the county board of equalization was determined by will or caprice or selected at random; or that the board's decision was not governed by reason; was absurd; or exceeded the bounds of reason or moderation. An administrative decision is "arbitrary" when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151(1996); *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112(1996).

The Commission therefore evaluates Taxpayers' allegations in light of this test.

### II.

#### EVIDENCE BEFORE THE COMMISSION

The Commission took judicial notice of the Rules and Regulations of the Tax Equalization & Review Commission; the pleadings in the case file; the provisions of Title 316, *Nebraska Administrative Code*; the statistics which were prepared and submitted by the Property Tax Division as required by Neb. Rev. Stat. § 77-1327 (6) (Reissue 1996) (This document establishes that the "level of value" for commercial property within Lancaster County for 1996 was 94.00%. The "Coefficient of Dispersion" was 8.84, and the "Price-Related Differential" was 96.56); the County Profile for Lancaster County for 1996 which was prepared and submitted by the Property Tax Division; the standard reference work *Property Assessment Valuation*, 2nd Edition, by the International Association of Assessing Officers; Volumes 1 and 2 of the Nebraska Assessors Manual, *Marshall Swift Residential Cost Handbook*, and the *Cole, Laver, Trumble Appraisal Manual*.

The following exhibits were also received by the Commission: For the Taxpayer: Lease Store Database (1 page); Buyer Settlement Statement (1 page), and J. C. Penny Store Assessments for Nebraska (1 page). For the County: Transcript of Proceedings of Lancaster County Board of Equalization; and Report of Appraisal by Lancaster County Assessor's Office (59 pages).

A.  
**The Subject Property**

The subject property is a two year old, two story, single tenant, anchor department store. The property is located in the Gateway Mall in the City of Lincoln, Lancaster County, Lincoln, Nebraska. The improved site building consists of a parcel of land which is 365,206 square feet in size, and which contains a gross building area of 125,870 square feet.

The subject property is located in a super regional shopping center. A super regional center provides for extensive variety in general merchandise, apparel, furniture, and home furnishings, as well as a variety of services and recreational facilities. It is built around three or more full-line department stores of generally not less than 100,000 square feet each. In theory, the typical size of a super regional center is about 800,000 square feet of gross leasable area. In practice, the size ranges from about 600,000 to more than 2,000,000 square feet. *Dollars & Cents of Shopping Centers*, 1995(pg. 3).

B.  
**Taxpayer's Evidence**

Taxpayer adduced as evidence of value exhibits one, two three, and four. Exhibits one and two were received in their entirety, exhibit three was not received, and exhibit four was received in part. Exhibit two shows that the Taxpayer acquired the land upon which the improvements were made in 1994 for \$2,267,000.

Exhibit one shows lease data for J. C. Penney stores which are located in Kansas, Oklahoma, Nebraska and Iowa. However, the record does not establish that these stores are anchor stores in a super regional center, the demographics of the towns, market information, etc. This information is essential in order to determine whether these stores are comparable to the subject property. Exhibit four consists of assessments for J. C. Penney stores located in five midwestern states. However, "assessed value" is meaningless without information regarding the real property tax laws of the states of Kansas, Iowa, and Colorado. That information is therefore of no assistance. Furthermore, the information regarding the assessments in Kearney and Omaha is likewise of little value, since the Taxpayer did not make the indicated levels of value for those cities part of the record, and further did not request the Commission to take notice of that information. Finally, no evidence was presented to establish the quality, condition, or income for those properties. The evidence in exhibit four does, however, establish that the age of the properties in Hilltop Mall, Kearney, is 1988, and Westroads Mall in Omaha is 1967. The condition of these

stores (and therefore depreciation) may play a significant role in the assessed value of those stores. The assessed value of the Oak View Mall store, at \$50.82 per square foot, is however, significant, since that store is three years old, the store is owned by Taxpayer (as opposed to being rented), and the size (125,065 square feet), is comparable to the size of the subject property, which is 125,870 square feet.

Taxpayer also adduced evidence regarding the hearing procedures for its protest. Taxpayer is based in Dallas, Texas. Taxpayer adduced information regarding the referee's recommendation of value for the subject property (\$6,815,860), and also adduced uncontradicted evidence that it was only allowed one day's notice to prepare for the hearing before the County Board of Equalization. Finally, the Taxpayer presumed that the referee's recommendation was the value the Board was going to set for the property. Taxpayer was notified five minutes prior to the Board's hearing that the recommendation of the County's referee would not be followed.

### C. County's Evidence

The County submitted the transcripts of the proceedings before the County Board of Equalization. Prior to the hearing before the Board, the County's Referee recommended a value of \$6,815,860. The Referee valued the property at \$6,815,860 using a capitalization rate of 10% and \$6.00 per square foot rent. Exhibit 6, p. 31. A copy of that recommendation was provided to the Taxpayer. The Coordinator of the Referees also signed the recommendation. The County Board of Equalization, according to the handwritten notes on the "1996 Referees Report" (Ex. 6, p. 36), thereafter "reviewed market rents & Sales - Dillards - Also cost of cons. of Penney's est. 9 - 10 mil Adjust value to - \$69 or 8.25 [illegible] 125,870 sq ft x \$69. \$8,685,000." The record shows that the "estimated" cost of construction was based on the following testimony of the Referees Coordinator:

"Well, we've all read the paper up here in which we heard that you were spending close to \$10,000,000 out there or something . . ."

Ex. 6, p. 8. That Coordinator also explained "Well, I'll have to take the blame for that one because the referees' notice got out of here with my signature on it in the first place. We didn't get the whole thing analyzed before it got out of here. . ."

The County Assessor's Office determined the fair market value of the subject property for tax year 1996 to be \$9,007,973. Exhibit 6, p. 17. Taxpayer protested that determination, and the County appointed a referee to consider the matter. The

referee, presumably based on his training and experience, determined the fair market value of the property to be \$6,815,860. Exhibit 6, p. 31. The Referee Coordinator's signature appears on that recommendation, which ordinarily indicates approval of the recommendation. The County Board of Equalization chose not to follow that recommendation, and it is clearly entitled to do so. Where as here, however, the taxpayer is located in Texas, only one day's notice of hearing is provided, and the County Board of Equalization rejects its own referee's recommendation based on what it heard on the street and on the pretext that "We didn't get the whole thing analyzed before it got out of here . . ." such action has "gone far to invalidate and still farther to discredit the public proceedings in the important matter of the county finances." *Sumner & Co. v. Colfax County*, 14 Neb. 525, 526 (1883). Furthermore, such action clearly and unequivocally constitutes unreasonable and arbitrary behavior.

### **The County Assessor's Appraisal**

The County's evidence before the Commission included information regarding the value of the subject property. This information was not presented to the County Board of Equalization. The evidence consists of an appraisal done by the County Assessor's office which is not dated, but which indicates that the estimate of value is as of January 1, 1996.

#### *I.*

#### *Cost Approach*

The cost approach to value provides a value indication that is the sum of the estimated land value and the estimated depreciated cost of the building and other improvements. The cost approach usually works best for newer improvements, because construction costs are easier to estimate and there is less depreciation. This approach is especially useful for appraisal of properties for which sales and income data are scarce. *Property Assessment Valuation, Second Edition*, p. 127.

The County's interpretation of the cost approach valued the land at \$2,265,660, the site improvements were valued at \$8,578,236, less \$722,686 total depreciation, for a total of \$10,121,210.

The appraiser considered six sales of land in order to determine the value of the land, including the sale of the subject property in 1994. The gross building area of the five "comparables" ranged from a low of 34,666 to 81,514 square foot. The subject property has a gross building area of 125,870. The "comparables" range in size from a low 27% of the size of the subject property to a maximum of 65% of that

of the subject property. The appraiser therefore used the most conservative of the average costs of land of \$18.00 per square foot. This amount was reached based on the sale of the subject land in 1994 for an average of \$18.01 per square foot for the land.

The appraiser then selected the Segregated Cost method of determining the cost (replacement cost new) of the subject property, using the Marshall Valuation Service. The total replacement cost new of the property using the method was determined to be \$8,578,236. The total depreciation determined by the appraiser was \$722,686 (approximately 8.4%), and is set forth in Exhibit 7.

## 2.

### *Income Capitalization Approach*

"The capitalization process restates market value by converting the future benefits of property ownership into an expression of present worth." *Property Assessment Valuation, Second Edition*, p. 203.

The Income Capitalization Approach used by the County appears to be flawed. The County lists four properties which are shown as "comparables." Of these four, only one of the properties qualify as true "comparables." The test for "comparable properties" is set forth in *Property Assessment Valuation, Second Edition*, at page 98. In order to qualify as "comparables," professionally accepted mass appraisal techniques require that the offered properties be similar as to:

"Overall quality, architectural attractiveness, age, size (for example, square footage . . . ), amenities, . . . functional utility. . . physical condition . . . "

The subject property is a two year old building. The size of the property is 125,870 square feet. It is located in a super regional center.

The comparables shown are as follows:

Lessee	Location	Lease Date	Lease Term	Size/SF	Rent/sq. ft.	Comparability
Subject	Lincoln, NE Super regional center	-	-	125,870		-
1. Miller & Paine (Dillards)	Lincoln, NE Super regional center	1986	5 years	155,861	\$4.52	Poor: size
2. Brandeis (Younker's)	Lincoln, NE Super regional center	1975	30 years	102,255	\$5.48	Poor: size
3. Best Buy	Lincoln, NE	1995	Unknown	60,281	\$5.78	Poor: size, location
4. Shopko	Lincoln, NE	1984	25 years	82,939	\$8.06	Poor: size, location

The square footage of these buildings vary considerably (more than a 10% difference in size). This difference *may* ordinarily be accounted for through the adjustment process when the "comparables" bear significant similarities to the subject property. Here, however, the adjustments fail to adequately consider the differences. Furthermore, given the large disparity of size and location, the fact that "comparables" three and four are not anchor stores, are not located in super regional centers, and are "discount" stores, the disparities cannot be ameliorated by adjustments. Finally, the lease for comparable number 1 would have expired in 1991, and no evidence has been presented to show that the same rent would have been charged in 1996.

Assuming that comparables one and two are the most like the subject property, the record demonstrates that the median rental rate should be \$5.00 per square foot. It should also be noted that the County originally used a capitalization rate of 11.5%. The capitalization rate, in professionally accepted mass appraisal methodology, is to be determined from the market, and uniformly applied to similar property. Here the record shows that the capitalization rate originally used in the CAMA System (the mass appraisal software system used by the County) was determined to be 11.9% (which rate included 2.4% for the effective tax rate). In the appraisal offered by the County at the hearing before the Commission, the County used a 7.5% capitalization rate, which does not include taxes. The County, recognizing that the income approach requires that real estate taxes be accounted for (Exhibit 7, p. 49), then allowed no expenses for taxes. (Exhibit 7 at page 50). To apparently exclude any provision for real estate taxes constitutes an improper use of the income approach.

3.

*Sales Comparison Approach*

The Sales Comparison Approach compares the property being appraised with similar properties sold in the recent past. *Property Assessment Valuation, Second Edition*, at page 45. The steps in the approach are: data collection and verification; analysis of market data to develop units of comparison and select attributes for adjustment; development of reasonable adjustments: application of adjustments to the comparable sales; and finally analysis of adjusted sales prices to estimate the value of the subject property. *Property Assessment Valuation, Second Edition*, at page 45-46.

The Sales Comparison Approach used by the County is also flawed. This flaw is demonstrated in the information contained in Exhibit 7. The appraisal only has one sale for this approach. This sale, of an adjacent anchor store in the same super regional center as the subject property, was for \$6,000,000. The store was rehabilitated at a cost of \$5,200,000. The "adjusted sales price," according to the appraiser, was therefore \$11,200,000, or \$71.86 per square foot, which, according to the appraisal, estimates the value of the subject property at \$9,045,018. However, one sale is insufficient to support any reasonable conclusion as to the value of property. Furthermore, no evidence was presented to show the age of the "comparable" property prior to the sale, the quality of construction, or the condition of the property.

C.

**Valuation of the Subject Property for Tax Year 1996**

The County's estimation of value is based on the three approaches which are professionally accepted for purposes of mass appraisal. The results of those estimations, as corrected, are shown below:

Cost Approach	\$10,121,000	or	\$80.41/sq. ft.
Income Approach	\$ 8,307,420	or	\$66/sq. ft.
Sales Comp. Approach	\$ 9,045,018	or	\$71.86/sq. ft.
County Board	\$ 8,685,000	or	\$69.00/sq. ft.
Oak View Mall Store	\$ 6,356,000	or	\$50.82/sq. ft.

The three approaches to value are correlated in fee appraisal work. Here the

three approaches to value result in estimations that are fairly close. However, the results obtained from both the income approach and the sales comparison approach are suspect, for the reasons set forth above. The cost approach, under these circumstances, must be relied upon as the most accurate measure of the value of the subject property. And, the assessed value of the subject property, as determined by the County, is substantially less than the estimated value under the cost approach.

Finally, as noted by the County's appraiser, an anchor store "is simply a part of a much larger economic unit. . . The income stream associated with an anchor department store building is inextricably intertwined with that of the retail mall with which it is associated." Exhibit 7, p. 52. Although Exhibit four alleges that the assessed value for the J. C. Penney store in Oak View Mall is \$50.82/sq. ft., no evidence regarding the income stream for that store, or for the mall, is before the Commission. The Commission cannot therefore conclude that the difference in assessments between the two stores, which are located in different cities, which are in turn, located within different counties, establishes that the valuation for the subject property is unreasonable or arbitrary. From the record before the Commission, therefore, it cannot be said that the assessed value of the subject property exceeds the fair market value of the subject property as alleged by the Taxpayer.

## FINDINGS OF FACT

From the pleadings and the evidence the Commission finds and determines as follows:

1. Taxpayer owns certain commercial real property legally described as Lot 2, Gateway Shopping Center Subdivision to the City of Lincoln, Lancaster County, Nebraska, more commonly known as 6100 "O" Street.
2. Taxpayer timely protested the valuation of the subject property for tax year 1996 to the Lancaster County Board of Equalization.
3. The County appointed a referee who recommended a value of \$6,815,860.
4. The Taxpayer was notified of this decision.
5. The Taxpayer's representative is from Dallas, Texas.
6. The Taxpayer was provided with one-day's notice of the hearing before the County.

7. The Taxpayer was notified five minutes prior to the hearing before the County that the Referee's recommendation would not be followed.
8. The County Board of Equalization reduced the valuation from \$9,007,973 to \$8,685,000.
9. The County Board of Equalization was unreasonable and arbitrary in its method of conducting the hearing, and in its decision-making process.
10. The record does support the County's determination of the assessed value of the subject property for tax year 1996.

## JURISDICTION

The jurisdiction of the Tax Equalization and Review Commission is set forth in Neb. Rev. Stat. §77-1233.04(6) (1995 Supp.).

## STANDARD OF REVIEW ANALYSIS

The Tax Equalization and Review Commission is not a court. The Commission was created pursuant to state law to provide for an accessible and affordable system of review of valuation decisions. Under such circumstances, applying the standard devised by the Nebraska Supreme Court to the Commission would be presumptuous and ill-advised.

Therefore, the Commission must adopt a standard applicable to cases it hears and decides. This standard must be in keeping with the precept that tax laws are to be strictly construed, and construed in the light most favorable to the taxpayer. *See, e.g., Nebraska Annual Conference of the United Methodist Church v. Scotts Bluff County Board of Equalization*, 243 Neb. 412, 416, 499 N.W.2d 543, 547 (1993), and *Sioux City and Pacific R.R. v. Washington County*, 3 Neb. 30, 32 (1873). In determining that standard, resort must be made to the language of the statute. The Nebraska Supreme Court has often held that statutory construction is a simple task. The Court has held "In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result. . . . Statutory language is to be given its plain and ordinary meaning. . . ." *Metropolitan Utilities Dist. v. Twin Platte Natural Resources Dist.*, 250 Neb. 442, 451, 550 N.W.2d 907, 913 (1996).

or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151(1996); *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112(1996).

### CONCLUSIONS OF LAW ANALYSIS

The Commission must determine the facts from the record before it. The record in this case demonstrates that the County's procedures for holding "protest" hearings pursuant to Neb. Rev. Stat. Neb. Rev. Stat. §77-1501, *et seq.* (Reissue 1996) are unreasonable and arbitrary. However, the record before the Commission supports the assessed value of the subject property for tax year 1996. Therefore, the Commission must, and hereby does, conclude as a matter of law that the determination of the County that the assessed value of the subject property should be \$8,685,000 for tax year 1996 was neither unreasonable nor arbitrary.

### ORDER

IT IS, THEREFORE, ORDERED as follows:

1. The decision of the Lancaster County Board of Equalization which reduced the assessed value of Taxpayer's property to \$8,685,000, for tax year 1996 is affirmed.
2. Taxpayer's real property, known in the Lancaster County Assessor's Office as Parcel 17-21-322-002-000, shall be valued at \$8,685,000 for land and improvements as follows for tax year 1996:

Land	\$2,265,660
Improvements	\$6,419,340
Total	\$8,685,000

3. That this decision, if no appeal is filed, shall be certified within thirty days to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-1511 (Reissue 1996).

4. That each party is to bear its own costs in this matter

**IT IS SO ORDERED.**

Dated this 26th day of June, 1997.



*Seal*

Mark P. Reynolds, Chairman

Janet L. Edwards, Commissioner